SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

CASE No. 687

GENEVIEVE D. SCHREFFLER,

Petitioner,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment below of the United States Court of Appeals for the Fifth Circuit.

NOTE: Unless otherwise indicated, all emphasis is supplied.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 376 F.2d 397.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The judgment of the Court of Appeals was entered on April 25, 1967. Petitioner's timely petition for rehearing as appellee below was denied on June 8, 1967.

QUESTIONS PRESENTED

According to petitioner, the petition presents the following questions:

I.

Whether the judgment of the Court of Appeals denied Petitioner her right to trial by jury, as guaranteed by the Seventh Amendment to the United States Constitution, and further whether this deprived her of due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

II.

Whether it is proper where federal jurisdiction is based on diversity of citizenship for the Court of Appeals to use the federal test of sufficiency of the evidence to review a jury verdict.

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

Petitioner sued respondent in a Florida trial court. Respondent removed the case to the United States District Court in and for the Southern District of Florida. Petitioner sought to recover under the double indemnity provisions of a group life insurance policy respondent had issued on the life of her husband.

The facts as stated by the Court of Appeals below include the following:

> "The insured, Louden Schreffler, had suffered from asthma and pulmonary emphysema for the ten years preceding his death. Pulmonary emphysema is a chronic and progressive disease which destroys normal lung tissue and prevents transfer of oxygen to the bloodstream in usual amounts. From 1954 until his death in 1962, Schreffler was treated by Dr. Thomas D. White, his family physician.
>
> On the morning of April 24, 1962, Schreffler

(taking the view of the evidence most favorable to plaintiff) tripped and fell at home, breaking his hip. He was admitted to the hospital by Dr. White and underwent surgery to set the fracture. The surgeon was Dr. George Richards, who testified at trial. The surgery was successful, but following it Schreffler's lung condition worsened and he died on May 3." 376 F.2d at 399.

The policy sued on defined "accidental death" as follows:

"PART II. Accidental Death and Dismemberment Benefits.

If the Insured, while this Policy is in force, sustains an accidental bodily injury which results, **directly and independently of all other causes,** in the loss of life, sight or limb by such person within ninety days after the date such injury is sustained * * *

Exceptions and Reductions Applicable to Part II * * * For the purposes of this Part II, no loss shall be considered a loss due to accidental bodily injury if such loss is caused **or contributed to** by (1) bodily or mental infirmity or disease; or (2) any infection, other than a pyrogenic infection occurring through and at the time of an accidental cut or wound." 376 F.2d at 398. [Emphasis and editing the Court's.]

Petitioner obtained a favorable jury verdict and final

judgment in the trial court (R. 253-254). The Court of Appeals reversed, holding that the proofs were insufficient to come within the policy definition of "accidental death". In reaching this conclusion, the Court of Appeals said that:

> "The question of what circumstances justify the setting aside of a jury verdict, like other questions concerning the judge-jury relationship in the federal courts, is governed by federal law. Byrd v. Blue Ridge Rural Electric Co-Operative, 1958, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953, reh. den. 357 U.S. 933, 78 S.Ct. 1366, 2 L.Ed.2d 1375 (1958); ABC-Paramount Records, Inc. v. Topps Record Distributing Co., 5 Cir. 1967, 374 F.2d 455; Shirey v. Louisville & Nashville R.Co., 5 Cir.1964, 327 F.2d 549; Braud v. Baker, 5 Cir. 1964, 324 F.2d 213; 5 Moore, Federal Practice ¶50.06 at p. 2350 (2d Ed. 1966)." 376 F.2d at 399.

The opinion below then discusses the liberal federal rules concerning the sufficiency of the evidence to create a jury question and analyzes the evidence in detail. Having walked "the last mile to pay every heed to the jury's verdict", the Court of Appeals goes on to hold:

> "The Florida Supreme Court has construed substantially similar language in the policy thus:
>
> > 'Double indemnity policies imposing liability when death results from bodily injury effected solely by external, violent and accidental means generally contain an exemption from such liability if death results di-

> rectly from disease or bodily infirmity. When such provisions are construed together or if the accidental injury and the preexisting disease or infirmity cooperate in causing the death of insured, doubled indemnity can not be recovered even though the injury is an active, efficient and procuring cause, provided the disease or infirmity contributes either directly or indirectly to causing insured's death.'

Berg v. New York Life Insurance Company, Fla. Sup.Ct.1956, 88 So.2d 915, 917. The Maccabees v. Terry, Fla.Sup.Ct.1953, 67 So.2d 193. In Decker v. New York Life Insurance Co., 5 Cir. 1964, 328 F.2d 650, 652, a case quite similar to the present one, we said in interpreting Florida law:

> ' * * * [I]t does not follow that death resulted directly and independently of all other causes from the accidental injury merely because the treatment of the injury impaired the treatment of the heart condition with the result that the heart condition took a fatal turn. The decedent died of a preexisting heart condition and hence it was a cause of death. This, we think, is so even though the injury and the treatment of it were active and contributing causes. With the preexisting heart condition, whether called a disease or infirmity, contributing to the insured's death, there can be no recovery on the double indemnity provisions of the policy.'

Dr. White did not testify that the accident and operation, as isolated contemporary occurrences, brought about the insured's death. Indeed, construed in the light of the standard expressed in these cases, Dr. White's testimony admits of no other interpretation than that the insured's death was brought about in part, or contributed to, by the chronic disease. The most tolerant semanticist could not brook any other construction of the expression that 'the method or mode of dying' was the illness. This is also the clear meaning of Dr. White's other explicatory statement that 'the reason he died after the operation was, in my best judgment, the aggravation of his pulmonary emphysema.'

We therefore conclude that the jury had no basis in the evidence to conclude that the insured's death resulted from an accident 'directly and independently of all other causes' within the policy's meaning. Therefore we hold that the trial court should have granted judgment for Prudential notwithstanding the verdict." 376 F.2d at 401-402.

REASONS FOR DENYING THE WRIT

1. Florida substantive law clearly provides that there can be no double indemnity under the present policy "if the accidental injury and the preexisting disease or infirmity cooperate in causing the death of the insured . . . even though the injury is an active, efficient and procuring cause. . . . " BERG v. NEW YORK LIFE INSURANCE COMPANY (Fla.1956), 88 So.2d 915, 917. Pe-

titioner cannot and does not question this Florida insurance law definition of "accidental death" under the instant policy. Accordingly, the opinion below correctly interprets local law in a diversity case.

2. The evidentiary basis for the conclusion below that "the insured's death was brought about in part, or contributed to, by the chronic disease" is set out in footnote 1 of the opinion below. 376 F.2d at 399-400. Dr. White's testimony was the most favorable testimony for the petitioner. The most that can be said for his testimony is that the accidental fall was the "producing cause" or "triggering mechanism" which resulted in a death in which chronic asthma and pulmonary emphysema were also contributing causes. While the insured could have obtained insurance with a different definition of "accidental death", the fact remains that he did not so do.

3. Petitioner's claim that she has been denied rights under the Seventh and Fourteenth Amendments are wholly lacking in substance. The Fourteenth Amendment is inapplicable since no "state" action is involved. The Seventh Amendment expressly permits appellate reversals for insufficient evidence "according to the rules at common law." Cf. DIMICK v. SCHIEDT, 293 U.S. 474.

4. There is admittedly a conflict among the circuit courts as to whether the sufficiency of the evidence to sustain a verdict in a diversity case is tested by state or federal law. DICK v. NEW YORK LIFE INS. CO., 359 U.S. 437. While petitioner now claims that "The question of the sufficiency of the evidence to sustain a jury verdict in diversity cases should be governed by state law" (Petition, p. 13), petitioner claimed the exact contrary below:

"The question of the sufficiency of the evidence to sustain the jury verdict is controlled by federal law. Braud v. Baker (5th Cir.1963), 324 F.2d 213, 216; Shirey v. Louisville & Nashville Railroad Company (5th Cir.1964), 327 F.2d 549, 552; Royal Indemnity Co. v. Curtis, (5th Cir.1958), 256 F.2d 329, 331. In resolving this issue the evidence should be viewed in a light most favorable to the Appellee and she is entitled to the benefit of every legal rational inference. Continental Ore Co. v. United Carbide and Carbon Corp., (1962) 370 U.S. 690, 696; Atlantic Greyhound Corp. v. Crowder, (5th Cir.1949), 177 F.2d 633." (Petitioner's Brief as Appellee below, page 5.)

The doctrine of invited error clearly precludes petitioner from now claiming that state law is controlling. "Generally, at least, suitors may not maintain a position here which conflicts with that taken below; . . . " OHIO EX REL. SENEY v. SWIFT & CO., 260 U.S. 146.

5. Petitioner has made no showing that the Florida test of the sufficiency of the evidence differs from the federal test. Likewise, petitioner has not shown and does not claim that the Florida rule is more favorable to her position than the federal law. Petitioner's second question poses a purely academic point and is a classic example of harmless error.

6. The decision below is correct, in probable accord with this Court's prior decisions, and does substantial justice between the parties. Under the Seventh Amendment, federal courts are under just as much of a duty to

set aside verdicts in "no evidence" cases as they are to uphold verdicts which are supported by "some" evidence.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing, Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, was mailed to the attorneys for the Petitioner, THOMAS H. ANDERSON, ESQ., and RICHARD M. LESLIE, ESQ., 1000 First National Bank Building, Miami, Florida 33131, this 26 day of October, 1967.

JAMES A. DIXON